U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 05 February 2007

CASE NO. 2005-LHC-1345

OWCP NO. 08-119021

In the Matter of:

T.P.,
Claimant,

v.

North Star Recycling Company,
Employer,

American Home Assurance Company,
Carrier.

Appearances: Quentin Price, Esq.
For Claimant

George Nalley, Esq.
For Employer and Carrier

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for compensation brought under the Longshore and Harbor Workers' Compensation Act, as amended ("the Act"). 33 U.S.C. § 901 *et seq*. The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring on the navigable waterways of the United States or certain adjoining areas, resulting in disability or death.

On November 2, 2000, Claimant received an injury to his left shoulder while preparing a barge to be loaded with steel. He brought this claim for compensation against his employer, North Star Recycling Company, and its carrier, American Home Assurance Company (collectively, "Employer").

Some of the issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing on March 29, 2005.

Pursuant thereto, Notice of Hearing was issued on July 20, 2005, scheduling a formal hearing which was postponed due to damage sustained by Employer in Hurricane Katrina. Another Notice of Hearing was issued on January 5, 2006, rescheduling the hearing date for April 25, 2006, and on that date the undersigned convened the formal hearing in Lafayette, Louisiana. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were admitted into evidence: Administrative Law Judge Exhibits ("AX") 1-3; Claimant's Exhibits ("CX") 1-16; and Employer's Exhibits ("EX") 1-7, 9-10, 12E and 12I.[1] TR at 11-12. Claimant was the only witness.

Both parties submitted post-hearing briefs. Based upon the evidence introduced, my observations of the demeanor of the witness, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

STIPULATIONS

At the hearing, the parties stipulated to the following:

1. On November 2, 2000 Claimant sustained a work-related injury to his left shoulder in the course of his work for Employer.
2. The Act applies to this claim, which was timely filed and noticed.
3. Claimant is entitled to compensation and medical benefits from Employer.
4. Claimant's average weekly wage is $826.04.
5. Claimant was temporarily and partially disabled from November 3, 2000 through April 2, 2001.
6. Claimant was temporarily and totally disabled from April 3, 2001 through May 21, 2002.
7. Claimant has been permanently and partially disabled from July 7, 2003 to the present.

Hearing Transcript (hereinafter "TR") at 6-8; AX 2 at 7; AX 3 at 6.[2]

ISSUES

1. Whether Claimant was permanently and totally disabled from May 22, 2002 to July 6, 2003, thereby qualifying Claimant for a cost of living increase, starting October 1, 2002.[3]
2. Claimant's wage-earning capacity from July 7, 2003 to present.
3. Interest and penalties.
4. Attorney's fees.

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[1] The following planned exhibits were withdrawn by Employer: EX 8, 11, 12A-D, 12F-H and 12 J-K. TR at 12.
[2] *See also* Claimant's Post-hearing Brief at 25; Employer's Post-hearing Brief at 9.
[3] The parties' pre-trial statements indicated agreement that Claimant reached maximum medical improvement on May 21, 2002. AX 2 at 7; AX 3 at 6. Employer nonetheless argues permanency began on July 7, 2003, while Claimant contends permanency began May 22, 2002. AX 2 at 8; AX 3 at 7; Claimant's Post-hearing Brief at 11; Employer's Post-hearing Brief at 9.

TR at 6-8.

FINDINGS OF FACT

Background

Claimant, a 48-year-old man, sustained an injury to his left shoulder on November 2, 2000 while working for Employer. The injury occurred as Claimant was moving loose pieces of scrap metal across the deck of the hold of a barge while preparing it to be loaded.

Claimant testified that he attended all of high school but did not earn a diploma; nor has he obtained a General Education Development test certificate ("GED"). TR at 35, 77; EX 10 at 4. On December 10, 1976, Claimant began working for Employer, at the age of 18, and continued to do so for approximately 25 years. *Id.* at 36, 43; EX 5 at 3-4. Claimant's job tasks included the loading and shipping of steel and other cargo onto barges, as well as some minor billing and inventory tasks. TR at 37-40. Claimant testified that he started out as a laborer, and was promoted to the position of forklift operator in a position termed "Leaderman" which later came to be termed "Tallyer." *Id.* at 37. According to Claimant, approximately a year prior to his injury Employer restructured its work crews, assigning Claimant to the position of Equipment Operator, a job which combined the positions of Forklift Operator, Tallyer/Leaderman, and Coil Loader. *Id.* at 37-38, 79-80; EX 10 at 2. Claimant testified that this new position involved forklift operation and heavy labor, including lifting and moving heavy materials weighing 40 to 80 pounds. TR at 38-39; EX 10 at 2. The Equipment Operator also designated inventory to be loaded, coordinated necessary paperwork to ensure the correctness of shipments and billing, and completed basic data entry on a computer. TR at 38, 42, 84-85.

Claimant's injury occurred on November 2, 2000 while he helped load a barge on the Neches River in Orange County, Texas. *Id.* at 43; EX 2 at 16; EX 5 at 4. Claimant testified that whenever a barge was to be loaded with steel cargo he was required to first load dunnage (scrap metal) into the hold, to prevent the cargo from damaging the bottom of the barge and vice versa. TR at 38-39. The process of loading loose dunnage apparently involves dropping it from a forklift into the bottom of the barge and then raking it by hand to spread it out on the floor. *Id.* at 43. The floor also has dunnage permanently welded to it. *Id*. Claimant testified that he was injured when he slid loose dunnage along the floor of the barge and his rake caught on the permanently welded dunnage, pulling hard on his left shoulder. *Id.* at 43. He immediately notified Employer about the injury. *Id.* at 41, 45; EX 5 at 3, 5.

Upon reporting the injury, Claimant was referred by Employer to medical care at the Beaumont Industrial Clinic. *Id.* at 4; CX 12 at 1-3. He was prescribed medication and was referred to an orthopedic specialist as well as to diagnostic imaging tests. *Id.* at 2-3; CX 13 at 5, EX 12E at 41, 43. An x-ray of Claimant's left shoulder took place on November 2, 2000. CX 12E at 1. Dr. Stephen N. Cherewaty reported that he found degenerative changes in the glenohumeral and acromioclavicular joints of the left shoulder, and in the latter he found minor sclerotic changes and a bony outgrowth at its margin. *Id*. Dr. Cherewaty noted that a rotator cuff injury would remain a possible diagnosis if symptoms persisted. *Id.* Claimant received an MRI on November 27, 2000. CX 14 at 5; EX 12E at 45. Dr. Brent L Wainwaring reported the following impressions: 1) a ganglionic cyst within the subscapularis bursa which may have arisen from a partial tear of the anteroinferior glenoid labrum; 2) probable degenerative

intrasubstance signal within the superior labrum; and 3) prominent AC joint arthropathy. CX 14 at 5; EX 12E at 45.

Jack C. Johnston, M.D., an orthopedic surgeon, saw Claimant on December 27, 2000 and on January 18, 2001 and provided Claimant with cortisone shots and a prescription for pain medication. TR at 45; CX 13 at 5, EX 12E at 38-41, 43. Claimant received a release to return to work on January 18, 2001, and worked light duty until the beginning of April of that year when he received surgery to his left shoulder. TR at 45-46, 91; EX 12E at 41, 43. Dr. Johnston recommended surgery at that point because medication and cortisone shots had not provided Claimant adequate relief from the pain in his left shoulder. *Id.* at 38-40. In March 2001, Dr. Johnston recommended arthroscopic surgery which took place on April 5, 2001. TR at 45, 91; CX 14 at 3; EX 5 at 43; EX 12E at 36, 38. Claimant testified the surgery did not provide pain relief. TR at 45, 47; EX 12E at 32. He completed two months of physical therapy after which he followed up with home exercise. *Id.* at 30, 32, 34. However, three months after the surgery Claimant was still reporting pain in his left shoulder, particularly when he would lift his left arm above his head. *Id.* at 30, 32, 34. Dr. Johnston continued Claimant on a program of home exercise and pain medication, but more than 5 months after the April 2001 surgery Claimant continued to report continuous pain in his left shoulder, as well as sharp pains in that shoulder when pushing off and when lifting his left arm over his head. *Id.* at 24-25. A month later, Claimant's pain had increased and Dr. Johnston recommended a second arthroscopic surgery. TR at 47; EX 12E at 22. This second surgery occurred on October 29, 2001; Claimant testified that the surgery helped but did not provide full relief from his pain. TR at 47; CX 14 at 3; EX 12E at 20. Dr. Johnston continued to prescribe pain medication and referred Claimant back to physical therapy in November 2001. *Id.* at 19.

After two months of physical therapy, Dr. Johnston noted that Claimant continued to experience ongoing pain in his left shoulder and weakness in the rotator cuff and referred Claimant to a program of home exercise. CX 13 at 4; EX 12E at 10, 14. On May 21, 2002, Dr. Johnston noted Claimant's left shoulder pain had not improved over time with multiple interventions and concluded Claimant had reached maximal medical improvement ("MMI"). CX 13 at 3; EX 12E at 9.

Dr. Johnston completed at least two Work Restriction Evaluations of Claimant, on April 15, 2001 (EX 3 at 2) and on March 28, 2002. CX 15 at 1; EX 3 at 2; EX 5 at 30. Both evaluations indicated Claimant could lift between 20 to 50 pounds. *Id.* Claimant testified that Dr. Johnston instructed Claimant to not lift more than 50 pounds from the floor to the waist and no more than 20 pounds from the waist up. TR at 48, 89-90; CX 15 at 1; EX 3 at 1, 2. Dr. Johnston wrote to Employer's vocational expert on May 21, 2002 that Claimant was restricted from lifting more than 50 pounds up to his waist and from lifting more than 20 pounds overhead. EX 12E at 8. These restrictions are found in Dr. Johnston's progress notes from that date as well. *Id.* at 9.

Claimant testified that Employer did not offer permanent light duty work but offered temporary light duty before and after the first surgery. TR at 41; CX 13 at 4; CX 14 at 3; EX 12E at 10, 20. His employment was apparently terminated in early 2002 sometime prior to Dr. Johnston's determination on May 21, 2002 that Claimant had reached MMI. CX 13 at 4; EX 12E at 10, 14.

Claimant testified that due to the heavy physical requirements of his former position with Employer, his injury would prevent him from being able to perform the job. TR at 40. He explained that he has not applied to equipment operator or forklift operator positions at other companies because his colleagues in the field have told him that these positions also require heavy labor. *Id.* at 81-83, 119-20.

A year after the injury, Claimant accepted assistance from a vocational rehabilitation program sponsored by the Department of Labor which was offered to him in October 2001. *Id.* 49-50; EX 5 at 44, 46-47; EX 10 at 1. Wallace A. Stanfill of Comprehensive Rehabilitation Services began working with Claimant in November 2001, and continued to do so until May 2004. TR at 49; EX 10 at 1; EX 10 at 1-92. The two initially discussed vocational goals and formed a plan for Claimant to obtain his GED. *Id.* at 4-7. According to Mr. Stanfill's notes from late 2001 and early 2002, Claimant was slow to enroll in the GED program and suffered an anxious reaction to returning to studies. *Id.* at 3, 5, 6. After receiving encouragement from Mr. Stanfill, Claimant finally began the GED program in January 2002. TR at 92-93; EX 10 at 3, 5, 6, 8. He apparently found the requirements of the GED to be very demanding and his attendance became sporadic after his teachers recommended he engage in intensive study given that the requirements for the exam had been increased significantly the year prior. TR at 52; EX 10 at 8, 10, 13, 15. Approximately four months after beginning the program, Claimant dropped out. TR at 51, EX 10 at 5, 17. At the hearing, Claimant emphasized that he quit because of the disparity between the level of coursework he completed in high school and the much steeper requirements of the current GED exam. TR at 51-52. He explained that he also quit because his GED instructors did not have enough time to provide him with the assistance he felt he needed. *Id.* at 93.

In April 2002, Claimant expressed an interest to Mr. Stanfill in becoming a loan processor in the mortgage industry. *Id.* at 52; EX 10 at 13. A loan processor verifies the earnings and other pertinent information of loan applicants. TR at 56; EX 10 at 13-14, 19, 21, 26. Several of Claimant's family members work in the loan industry and discussed the possibility with him. TR at 53; EX 10 at 16. Through these connections, particularly with Claimant's wife at the time, Claimant and Mr. Stanfill contacted and met with the local branch manager of McAfee Mortgage Company who agreed to employ Claimant via On the Job Training ("OJT"), a program subsidized by the Department of Labor, on the condition that Claimant first complete an offsite training program for loan processors. TR at 53-56, 94; EX 10 at 13-16, 26.

Claimant pursued the offsite training, which he attended at the Mortgage Training Institute in Denver on August 19 and 20, 2002. TR 53; EX 10 at 13, 25. Subsequently, he worked at McAfee Mortgage for approximately five to six months on a volunteer basis. TR at 54, 94-95; EX 10 at 29, 39. Mr. Stanfill noted Claimant's supervisor at McAfee provided positive feedback about Claimant's performance, and expressed optimism about the possibility of hiring Claimant through the OJT program. *Id.* at 26. However, at some point the company's needs changed and the loan processor position was no longer available, according to Mr. Stanfill. *Id.* at 26. As a result McAfee told Claimant he could apply to become a loan officer, a commissioned position that involved overseeing the loan application process and supervising

loan processors. *Id.* at 27. For a few months, McAfee remained committed to employing Claimant as a loan officer once Claimant garnered more on-the-job experience in his volunteer position, according to Mr. Stanfill's notes. *Id.* at 24-38. However, similar to the loan processor position, Claimant's supervisor subsequently informed him that the anticipated opening for a loan officer was also no longer available. *Id.* at 39. Mr. Stanfill noted that the company emphasized there were no problems in Claimant's job performance. *Id.* at 41.

Claimant testified that initially he found the loss of the position at McAfee so difficult that he felt unmotivated to further pursue his vocational goals, but eventually with Mr. Stanfill's encouragement he became motivated again. TR at 57-58; EX 10 at 46. From January through May of 2003, Claimant worked with Mr. Stanfill on locating another employer willing to hire Claimant as a loan processor through the OJT program. *Id.* at 42-51. In May 2003, Claimant located a new OJT employer. Claimant's wife at the time worked at Countrywide Mortgage and put him in touch with a supervisor at a new local branch who hired Claimant through the OJT program in July 2003. TR at 55-56; EX 5 at 28; EX 10 at 13-16, 26, 51, 55-56. Both Claimant and his supervisor at Countrywide were noted to be enthusiastic about the placement. *Id.* at 56, 59. Mr. Stanfill noted this enthusiasm continued as Claimant progressed through the three-month OJT program. *Id.* at 59-60; TR at 98. Claimant worked full time for $6 per hour, processing loan applications for one hour a day and answering phones for the remainder of the day. TR at 70, 97-98. Claimant was highly motivated and received positive performance feedback from his supervisor, according to Mr. Stanfill's notes. EX 10 at 60. By August 2003, Claimant had completed 20 loan applications and felt encouraged by his progress. *Id.* at 67. In September 2003, Mr. Stanfill noted Claimant reported that his supervisors expressed confidence that Claimant would probably be offered a full-time permanent position as a loan processor after he completed the OJT program at the end of that month. *Id.* at 67-68.

At that point, it was unclear whether Claimant would work for Countrywide or their affiliate, FMM Funding & Marketing, once he completed his three-month OJT program. TR at 70. Due to a slow-down of business in the mortgage industry Claimant apparently felt he was less likely to lose his job if he were working for Countrywide than if he were working for FMM. *Id*. At either location he was to receive the same wage as his OJT rate of pay, $6 per hour, but hoped his wages would increase quickly to $8 to $10 per hour. *Id*. at 70, 98. Claimant was hired by FMM at $6 per hour at the beginning of October 2003. *Id*. However, this position ended after one month due to an economic slow-down in the mortgage industry, according to Mr. Stanfill's notes. EX 10 at 73-74.

Claimant testified that he reassessed his plan to enter the mortgage industry when the anticipated position fell through, noting that he became very demoralized at that point. TR at 57-58. Mr. Stanfill noted that in late 2003 and early 2004 Claimant's only efforts at work consisted of checking in with his business contacts in the mortgage industry regarding whether a loan processor position might be opening up. EX 10 at 78, 82. Claimant did not return Mr. Stanfill's phone calls for approximately four weeks. *Id.* at 76-79. When they finally spoke, Claimant stated his contacts in the mortgage business had told him that the industry slow-down had continued and that there were still no job openings. *Id.* Mr. Stanfill's notes indicate Claimant continued to check in with his mortgage industry contacts at least through March 2004. *Id.* at 82.

After Claimant lost the job with FMM in October 2003, Mr. Stanfill repeatedly encouraged Claimant to engage in a job search outside the loan industry. *Id.* at 73-75, 78-79. According to Mr. Stanfill's notes, Claimant remained focused on his disappointment over losing his job and did not search for other jobs. *Id.* at 80. At the hearing, Claimant admitted that during this five-month period of unemployment from November 2003 to March 2004 he could have looked for a job and could have applied to fast food restaurants in his area. TR at 101-03, 112. Claimant noted that he was also experiencing difficulties at the time because he was going through a divorce. *Id.* at 101-03.

In March 2004, Claimant applied to U.S. Fidelity Mortgage as well as to a funeral home where a friend of Claimant's thought he could get him a job. *Id.* at 103-104; EX 10 at 83-84, 86. Mr. Stanfill's notes indicated that Claimant's sister, who provides floral arrangements for the funeral home, also apparently helped Claimant obtain a job interview. *Id.* at 84, 86. Claimant was offered a position at the Claybar Funeral Home and began working there in April 2004 for $7.50 per hour without benefits. TR at 58-60, 102, 105; EX 10 at 86-88. He explained that his duties involved transporting death certificates to various locations to be processed, including physicians' offices, the court house, and the health department. TR at 58-60, 104, 106; CX 9 at 4. Claimant testified that he also filled in for absent co-workers at two funerals after Mr. Stanfill helped him purchase some suits. TR at 60; EX 10 at 87-88, 90-91.

Initially, Claybar offered part-time work but Claimant took a full-time time position that became available in June 2004. TR at 59; EX 10 at 90. Claimant reported to Mr. Stanfill that his employer was very pleased with his performance. *Id.* at 90-91. It was at this point that Mr. Stanfill recommended termination of rehabilitation services because Claimant's long-term prospects with the funeral home were very positive. *Id*. Mr. Stanfill terminated vocational rehabilitation services on June 17, 2004. *Id*. at 91.

Claimant left the position with Claybar in the fall of 2004 because the funeral home position did not include benefits. TR at 60-61, 107. He began work a week later for a floral service that offered benefits. *Id.* at 60-61, 107. Claimant worked as a driver for Johnson's Wholesale Florists, delivering flowers at $6 per hour plus benefits from October 2004 to sometime in early 2005. *Id.* at 60-61; CX 9 at 5; CX 10 at 2. He apparently wanted to stay in this position but developed a problem with severe sleepiness while driving and felt forced to quit the job. TR at 107; CX 9 at 5**.** According to Claimant testimony, the job involved deliveries that required driving for hours at a time, and although he tried to take breaks and drink coffee to stay alert, he apparently felt he had no choice but to leave the job. TR at 62; CX 9 at 5; CX 10 at 2-3.

Claimant testified that a few weeks later he obtained an errands job, working for his treating physician, Dr. Johnston, which paid the same as Johnson's Wholesale Florists ($6 per hour) but also provided free medical services in contrast to the $2 per hour Claimant paid in health care premiums while at Johnson's Wholesale Florists. TR at 61, 63-64, 108-09. The job lasted for three to four months according to Claimant, until Dr. Johnston's clinic merged with another clinic and Claimant's position was eliminated. *Id.* at 63. The job required some driving but it did not pose the same problems for Claimant with sleepiness, apparently because it involved brief errands around town as opposed to driving all day. *Id.* at 107-08. Claimant testified that he continued to have problems with sleepiness but was able to complete the brief

driving tasks. *Id.* at 62, 107-08. More recently, Claimant was diagnosed with diabetes and learned that this was the cause of the severe sleepiness, which he continues to experience. *Id.* at 62, 65, 107-08.

After Claimant lost the job with Dr. Johnston's clinic, he felt very "down and out" and did not apply to jobs, admitting at the hearing that he could have. *Id.* at 64-65, 110-12. After a five-month period of unemployment (mid-2005 to the end of November 2005), Claimant took a temporary position for six weeks at Oak Acres Mobile Homes. *Id.* at 109-110. He was paid $6.50 per hour. *Id.*

At that point, Claimant began to consider running his own business. His parents had started a lawn care business that year, and he agreed to take it over in January 2006. *Id.* at 64, 107, 111-12. He testified that he spent the first few months of 2006 completing and filing his business and tax paperwork to begin the business. *Id.* at 110-11. He admitted that he did not look for a job and has not looked for a job since then. *Id*. He explained that instead he has been working to develop his new business which he testified has been grossing approximately $400-500 per month. *Id.* at 59, 65-67, 109-111; EX 10 at 70, 98.

At the hearing, Claimant expressed feeling very positive about owning his own business because of repeated disappointments he experienced since leaving his position with Employer. TR at 65. He also prefers running his own business so that he can tailor his tasks to conform to his physical limitations. *Id*. He testified that he has been working to expand business by advertising in the local paper and consulting with friends who own businesses. *Id.* at 65-67. He also testified that he expects the business to expand to the point that he will have a "decent income." *Id.* at 65-67.

Vocational Assessment Report and Labor Market Surveys

On June 24, 2002, Employer retained vocational consulting services to assess the labor market in Claimant's area. EX 12I at 1. Within a few weeks, Vicki Colenburg, M.S., L.P.C., issued an initial vocational assessment report. *Id.* at 2. She then issued three labor market survey reports over a three-year period. *Id.* at 2-20.

Ms. Colenburg never met with Claimant. *Id*. at 2, 5-20. Ms. Colenburg wrote she had initially planned to do so in order to assess Claimant's vocational capabilities but also wrote that she did not find such a meeting to be necessary. *Id.* at 2, 5. According to Claimant testimony, he does not recall ever receiving a list or survey of jobs from Ms. Colenburg. TR at 93-94, 114-16.

The initial assessment, written on July 8, 2002, indicated that Ms. Colenburg planned to survey the labor market in Claimant's geographic area for positions compatible with Claimant's "vocational/educational background and physical capabilities." EX 12I at 4. Ms. Colenburg conducted a computer search to identify jobs that required "sedentary to medium duty work" for the initial assessment as well as subsequent labor market survey reports, but it is unclear whether the identified jobs conform to Claimant's lifting restrictions. *Id.* at 4, 6, 12, 16. Claimant testified that Dr. Johnston instructed him to not lift more than 50 pounds from the floor to the waist and no more than 20 pounds above the waist. TR at 48, 89-90; CX 15 at 1; EX 3 at 1, 2.

On May 21, 2002, Dr. Johnston wrote a letter to Ms. Colenburg two months before the initial assessment was written by Ms. Colenburg. In the letter, Dr. Johnston indicated Claimant was restricted from lifting more than 50 pounds above his waist and from lifting more than 20 pounds overhead. EX 12E at 8-9.

It is unclear whether Ms. Colenburg read the letter or knew of these restrictions. She wrote in the initial assessment that Claimant "is able to lift up to fifty pounds." EX 12I at 3. The labor market surveys do not indicate whether the positions listed conform to the lifting restrictions. For example, the first of three labor market survey reports indicated, "The jobs outlined are at medium duty work, per his OWCP-5 with permanent restrictions." *Id.* at 6 (August 16, 2002). Similarly, the second survey dated April 16, 2004 indicates, "According to the OWCP number, the treating physician, Jack Johnstone (sic), indicates (Claimant) is able to lift between 20 and 50 pounds continuously." *Id.* at 12. On December 10, 2005, Ms. Colenburg wrote in the final labor market survey, "This labor market research is based on medium level work. According to the file from a report from Dr. Jack Johnstone (sic), (Claimant) is able to lift between 20 to 50 continuously." *Id.* at 16.

Similarly, Ms. Colenburg conducted her labor market surveys without the information that Claimant had dropped out of his GED course. On July 1, 2002, the week before Ms. Colenburg wrote her initial assessment, she contacted Mr. Stanfill, Claimant's vocational counselor. *Id.* at 3-20. She also received records from Mr. Stanfill and learned of his early work with Claimant, including their original plan for Claimant to obtain his GED. *Id.* However, there is no indication in any of Ms. Colenburg's reports that she knew Claimant had dropped out of the GED program and had no plans to return. *Id.* at 1-20. By the time of Ms. Colenburg's initial assessment, Claimant had dropped out of his GED class three months prior because he found it too academically difficult. TR at 51-52, 93; EX 10 at 5, 17. Yet two of the three labor market surveys erroneously indicated that Claimant might be getting his GED. EX 12I at 11, 15.

August 16, 2002 Labor Market Survey Report

Although Claimant does not have a high school diploma or his GED, many of the jobs in the labor market survey of August 16, 2002 require a high school diploma or GED: 1) three sales positions; 2) Security Monitor; 3) Parts Delivery/Warehouse Person; 4) Residential Supervisor; 5) Dispatcher Supervisor. *Id*. at 8-11. In addition, it was noted a GED might be required for the Dispatcher/Warehouse Manager position. *Id.* at 9.

Prior to this survey, Dr. Johnston sent a letter to Ms. Colenburg outlining the lifting restrictions, which require that Claimant lift no more than 50 pounds up to his waist and no more than 20 pounds overhead. EX 12E at 8. Many of the jobs listed in this survey require some degree of what Ms. Colenburg characterized as light to medium physical duty. Most of those job listings provide some information about physical tasks required but none of the listings indicate whether the duties conform to Claimant's lifting restrictions, as follows: 1) Counter Salesperson for a building and material supply (appears to involve lifting but weight of items and type of lifting unclear); 2) Inventory Control Clerk (same); 3) Parts Delivery/Warehouse Person (same); 4) Building Attendant (requires lifting objects up to 50 pounds); 5) Dispatcher/Warehouse Manager (no details); and 6) Laborer for Emergency Services Unit (same). EX 12I at 6-7, 10-11.

The report of August 16, 2002 also identified three sedentary positions: 1) Telemarketing, noted as requiring "good people skills"; 2) Appointment setter, noted as requiring skills for dealing with customers over the phone; and 3) Seasonal Sprayer, which involves seasonal work driving a spraying vehicle for mosquito control. *Id.* at 7-8.

April 16, 2004 Labor Market Survey Report

Of the ten jobs listed in the April 16, 2004 survey report, two of them consist of part-time maintenance work, with no indication as to whether the jobs conform to the lifting restrictions that Dr. Johnston had provided to Ms. Colenburg in his letter on May 21, 2002. *Id*. at 12, 14; EX 12E at 8. Presumably the seven remaining positions involve full-time work. Four of the jobs are in customer service: Cashier at Sam's Club; Counter Person; Cashier at a school supply store; Front Desk Clerk at a motel. EX 12I at 13-14. One position, Parts Driver for Napa Auto Parts, presumably requires lifting of the parts for loading and delivery. *See id.* at 13. Another job, Courier/Light Maintenance, apparently requires driving. *See id.* at 14. The remaining positions involve maintenance and other physical work: Wireline Operator; Maintenance Helper; Courier/Light Maintenance; Officer Cleaner; and part-time Maintenance Worker. *Id*. at 12-14. As with the first labor market survey report, this report does not indicate whether any of the jobs with physical duties conform to Claimant's specific lifting restrictions. *See id.* Moreover, the jobs that require driving do not include any specificity as to whether they conform to Claimant's need to avoid extensive driving due to his diabetes. *See id.* It is not indicated in any of Ms. Colenburg's reports that she was aware of Claimant's diabetes or the apparent resulting need to avoid extensive driving. *See id*. at 1-20.

December 10, 2005 Labor Market Survey Report

In the final labor market survey report, dated December 10, 2005, nine of the ten positions listed involve maintenance and other physical labor: Grounds Laborer; Laborer; Maintenance Helper; Laborer; Route Technician (cleaning and restocking duties); Porter; Oilfield Service Trainee; Warehouse Assistant; and Maintenance Helper. *Id*. at 17-19. Some of the positions also require driving: Porter (moving vehicles and transporting passengers); Oilfield Service Trainee; and Grounds Laborer. *Id.* The following positions require lifting: Grounds Laborer; Laborer; Laborer (cleaning and racking steel); Porter ("some lifting required"). *Id.* However, no job that requires physical labor includes detail as to whether the work conforms to Claimant's lifting restrictions. *Id.* at 16-19. Similarly, there is no indication that the jobs that require driving conform to Claimant's need to avoid extensive driving due to his diabetes. *Id.* The one listing that involves a sedentary position, that of Day Helper at Quiznos, presumably does not involve driving but provides no information as to job duties at all. *Id*. at 19.

CONCLUSIONS OF LAW

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir.1982). However, the United States Supreme Court has determined that the true-doubt rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3d Cir. 1993). In arriving at a decision in this matter, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners or other expert witness. *Banks v. Chicago Grain Trimmers Ass'n, Inc.,* 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968); *Avondale Shipyards, Inc. v. Kennel,* 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce,* 551 F.2d 898, 900 (5th Cir. 1981); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997).

In their pre-trial submissions and at the hearing, the parties stipulated to the following periods of disability: 1) Claimant was temporarily and partially disabled due to his injury from the day after the accident, November 3, 2000, until April 2, 2001; 2) Claimant was temporarily and totally disabled from April 3, 2001 to May 21, 2002; and 3) Claimant has been permanently and partially disabled from July 7, 2003 to the present. TR at 6-8; AX 2 at 7-8; AX 3 at 6-7.[4]

Claimant contends that from May 22, 2002 to July 6, 2003 he was permanently and totally disabled and that therefore he is entitled to a cost of living adjustment ("COLA") as of October 1, 2002. TR at 6-8; AX 2 at 8; AX 3 at 7; Employer's Post-Hearing Brief at 13. Employer conceded in its Pre-Trial Statement that Claimant attained MMI on May 21, 2002 (AX 2 at 8), yet argues that no evidence supports Claimant was ever permanently and totally disabled and appears to be contesting both the nature and extent of Claimant's disability from May 21, 2002 until July 7, 2003. TR at 6-8; AX 2 at 8; Employer's Post-Hearing Brief at 11-12. Employer notes it has paid, and continues to pay, compensation and medical benefits, and had Claimant not brought the claim it would not have contested Claimant's disability had Claimant not pursued a cost of living adjustment ("COLA") and raised the issue of wage-earning capacity. TR at 6-8; Employer's Post-Hearing Brief at 13.

Although the parties have stipulated to Claimant's average weekly wage, Claimant contends that his post-injury wage-earning capacity should be lower than the $6 per hour presently used to calculate compensation. He argues that instead his wage-earning capacity should be the average of his actual earnings from July 7, 2003 through the end of 2005, during which Claimant had two five-month periods of unemployment. Claimant's Post-Hearing Brief at 17. Employer responds Claimant's post-injury earning capacity should be increased to be commensurate with Claimant's higher paying jobs after his injury, as well as jobs listed in the labor market surveys, arguing Claimant has been voluntarily underemployed and unemployed. Employer's Reply Brief at 2.

[4] In the Pre-Trial Statement, Employer wrote the uncontested period of temporary partial disability ended on April 20, 2001 but apparently intended that date to read April 2, 2001. *See* AX 2 at 8.

Nature and Extent of Disability

A claimant has the initial burden to establish the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Construction Co.,* 17 BRBS 56, 59 (1985). The nature of an injured worker's disability becomes permanent when the injury or condition reaches the point of "maximum medical improvement" ("MMI"). *James v. Pate Stevedoring Co.,* 22 BRBS 271, 275 (1989). The extent of a claimant's disability is determined by his ability to work. *Manigault v. Stevens Shipping Co*., 22 BRBS 332, 333 (1989). If a claimant meets the evidentiary burden of establishing that he is unable to perform his usual employment because of his injuries then that burden shifts to the employer to establish the availability of other jobs that the claimant could perform and secure. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1041 (5th Cir. 1981). If an employer fails to establish that the claimant is capable of performing suitable alternate employment or that suitable alternate employment is available, the claimant is entitled to total disability benefits. *Trask,* 17 BRBS at 59.

Claimant contends that he was permanently and totally disabled from May 22, 2002 to July 6, 2003 and that therefore he is entitled to a cost of living adjustment ("COLA") for benefits starting on October 1, 2002. Employer replies that "Claimant has failed to point to any physician whoever declared him to be permanently and totally disabled at any point." Employer's Post-hearing Brief at 11. However, permanency involves a solely medical determination, while determination of the extent of a disability does not. Analysis of the extent of a disability is largely an economic determination in light of a claimant's vocational abilities and limitations. *See Rinaldi v. General Dynamics Corporation*, 25 BRBS at 131 (1991). Although the purely physical extent of a disability is an important factor in determining unscheduled permanent partial disabilities under the Act, a claimant's capacity to earn wages is the ultimate fact to be determined. *Devillier v. National Steel & Shipbuilding Co*., 10 BRBS 649, 660 (1979), citing 33 U.S.C. § 908(c)(21).

For the following reasons, I find Claimant attained permanency on May 21, 2002, the date on which Claimant was found by his physician to have reached MMI. Dr. Johnston, Claimant's treating physician, wrote on May 21, 2002 that Claimant's pain had not improved after multiple interventions, including two surgical procedures, and concluded Claimant had attained MMI at that point. CX 13 at 3; EX 12E at 9. He also noted the impairment to Claimant's left upper extremity is 25%. CX 13 at 3; EX 12E at 9. Thus I find that the medical evidence in support of MMI establishes May 21, 2002 as the date on which Claimant received the maximum benefit of medical treatment such that his condition will not improve, establishing permanency on that date.

Based on this medical evidence, I also find that Claimant has met the initial evidentiary burden as to the extent of his disability because the evidence establishes he is unable to perform his usual employment due to his injuries. On May 21, 2002, Dr. Johnston determined Claimant would not be physically able to return to the position he worked until the time of his injury. CX 13 at 3; EX 12E at 9. Claimant's usual employment prior to his injury included physically setting up and loading material onto barges. TR at 38-39; EX 10 at 2. Dr. Johnston determined this physical labor would exceed the restrictions he had issued. CX 13 at 3; CX 15 at 1; EX 3 at 1, 2; EX 12E at 8-9. Thus, I conclude that the medical evidence establishes Claimant is unable

to perform his usual employment because of his injuries. Accordingly, the evidentiary burden shifts to Employer to prove Claimant was capable of working in suitable alternative employment from May 21, 2002 to July 6, 2003. *See Trask,* 17 BRBS at 59.

Employer contends that Claimant was not totally disabled during the relevant time period, emphasizing that "no doctor has ever suggested much less opined that (C)laimant was so disabled during this period as to cut his earning capacity to zero." Employer's Post-Hearing Brief at 11, 13. However, Employer once again misstates the required analysis. A claimant's initial evidentiary burden as to the extent of disability is limited to establishing his inability to perform his usual employment because of his injuries; once a claimant has shown this, the evidentiary burden shifts to the employer to prove the claimant is capable of working in suitable alternative employment. *Manigault v. Stevens Shipping Co*., 22 BRBS 332 (1989); *Clophus v. Amoco Prod. Co*., 21 BRBS 261 (1988); *Shell v. Teledyne Movible Offshore*, 14 BRBS 585 (1981).

Suitable alternative employment

The Act does not provide a specific standard for determination of the degree of disability for an unscheduled injury, but case law has developed such that this determination must be based not only on physical condition but also on other factors, including age, education, background, intellectual and physical capacities, employment history and experience, rehabilitative potential, and the availability of work that the claimant can do. *See Turner,* 661 F.2d at 1042*; Odom Consrt. Co., Inc. v. U.S. Dep't. of Labor,* 622 F.2d 110, 115 (5th Cir. 1980). The two-fold test for determining whether a job constitutes suitable alternative employment is whether the job falls within the range of claimant's capabilities and whether the job is reasonably available such that Claimant could realistically and likely secure it. *Turner*, 661 F.2d at 1042-43. Thus, a claimant may be found to be totally disabled even if he is physically capable of performing certain work if he is otherwise unable to secure that work. *Odom,* 622 F.2d at 115.

Claimant's education, background, and mental and physical capabilities

Claimant is a 48-year-old man who spent 25 years working for Employer. TR at 37-40. His job at the time of the injury included heavy equipment operation, heavy physical labor, and some basic billing and inventory tasks. TR at 37-40, 79-80; EX 10 at 2. Dr. Johnston noted on May 21, 2002 that due to the left shoulder injury Claimant is no longer capable of performing the heavy physical tasks of his former position of Equipment Operator, because he is restricted from lifting more than 50 pounds up to his waist or more than 20 pounds overhead. CX 13 at 3; EX 12E at 9. In addition, Claimant testified to experiencing severe sleepiness, a symptom of diabetes, which prevents him from working a job that requires extensive driving. TR at 62, 65, 107-08.

As for Claimant's educational background, although Claimant attended high school he fell short of credits and thus failed to earn a diploma. *Id.* at 35, 77. He took a GED course in early 2002 but suffered an anxious reaction that made it difficult for him to engage in the course, and found the coursework very difficult. EX 10 at 3, 5, 6. Claimant testified that he dropped out

of the GED course after three months because he found it too academically challenging. TR 51-52; EX 10 at 5, 17.

Claimant has a 25-year history of working positions that require certain types of heavy lifting that he can no longer perform because of his injury according to Dr. Johnston. CX 13 at 3; EX 12E at 9. Claimant's earning capacity appears to have decreased significantly due to this injury especially because he is additionally limited by his level of education, his older age, and the fact that he possesses few specialized skills beyond the expertise he developed working in a position he is no longer physically capable of performing. Claimant is limited in his earning capacity because he does not possess a high school diploma or GED. In addition, he has not held a position longer than five to six months since leaving his work for Employer. TR at 54, 60-65, 70, 94-95, 98 108-12; EX 10 at 29, 39, 60, 67-68, 70, 73-74. Claimant may thus be a weaker candidate for skilled, higher-paying jobs for which employers provide training, because employers may be reluctant to hire Claimant for fear of receiving only a few months' return on their training investment before Claimant then leaves the position. Some employers also may seek to invest in a younger worker.

Claimant's capabilities as a loan processor indicate he can process loan applications but the existence of any transferable skills is unclear. TR at 70, 97-98. For example, Claimant answered phone calls but it is unclear whether the calls were from customers and potential customers, or if instead the phone calls came from other departments within the bank. *See id.* at 97. As a result, it is impossible to determine whether Claimant performed any customer service tasks. *See id.* Similarly, there is no evidence Claimant developed marketable skills in the other positions he has held in the time since his injury. His jobs have involved unskilled work such as completing errands, transporting death certificates to various officials, delivering floral arrangements to retail florists, and guarding a mobile home business for six weeks. *See id.* at 54, 60-65, 70, 94-95, 98 108-12; EX 10 at 29, 39, 60, 67-68, 70, 73-74.

Labor market surveys for the time period of May 21, 2002 to July 6, 2003

The weight of a vocational counselor's opinion may be discounted where she has not had a personal meeting with the claimant and had no firsthand knowledge of the claimant's intelligence or interests. *Turner*, 661 F.2d at 1042. If the vocational expert is uncertain whether the positions she identifies in labor market reports are compatible with the claimant's physical and mental capabilities, the expert's opinion cannot meet the employer's burden of demonstrating suitable alternative employment. *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991); *Davenport v. Daytona Marina & Boat Works*, 16 BRBS 196, 199-200 (1984).

Employer's vocational expert, Vicki Colenburg, M.S., L.P.C issued two labor market surveys during the time period in question (May 21, 2002 to July 6, 2003). These reports consist of the initial assessment which tentatively lists possible job openings, and a labor market survey issued on August 16, 2002. EX 12I at 2-11. The other surveys Ms. Colenburg completed took place in 2004 and 2005, after the relevant time period. *Id.* at 12-20.

The initial report was submitted on July 9, 2002 and lists several possible jobs: Maintenance service dispatcher, Reservation clerk; Appointment clerk; Driver; and Surveyor

worker. *Id.* at 2-5. Ms. Colenburg indicated she only intended this listing to include potential employment. *Id.* at 4**.** Few details were provided for each position, so it is unclear whether Claimant would be capable of performing and securing any of these jobs with diligence. *See id*. at 2-5. Thus I find that the positions listed in the initial assessment cannot constitute suitable alternative employment.

Ms. Colenburg apparently never met with Claimant to assess his mental and physical capabilities. *Id.* at 5. The dearth of knowledge that Ms. Colenburg possessed regarding Claimant's vocational abilities is confirmed by examining the individual jobs listed in any of the labor market surveys, including the one labor market survey that took place during the time period in question. On August 16, 2002, Ms. Colenburg issued a report that lists jobs requiring medium duty physical activity but fails to indicate whether that duty conforms to Claimant's restrictions of lifting no more than 20 pounds over his head and no more than 50 pounds above waist level. *Id.* at 6-11. Ms. Colenburg apparently conducted a computer search for medium duty jobs without indicating whether she then assessed each job in light of the lifting restrictions. *See id.* No position listed that requires physical labor indicates whether the labor conforms to the lifting restrictions, as follows: Building Attendant (requires lifting objects up to 50 pounds); Counter Salesperson for a building and material supply (requires lifting and carrying but provides no details); Inventory Control Clerk (same); Parts Delivery (medium duty tasks including warehousing, stocking and delivering parts); Laborer for Emergency Services Unit (medium duty); Dispatcher and Warehouse Manager (same). *Id.* at 6-7, 10-11. Consequently, I find the labor market survey of August 16, 2002 fails to provide the exact nature and terms required to determine whether any job requiring physical labor constitutes physically suitable alternative employment for Claimant. *See Thompson v. Lockheed Shipbuilding and Construction Co*., 21 BRBS 94, 97 (1988).

Similarly, the remaining job listings, which do not involve physical labor, also do not provide information that establishes Claimant could secure and perform these positions in light of his capabilities and his vocational and educational background. The Seasonal Sprayer for mosquito control apparently requires extensive driving (EX 12I at 8) which Claimant must avoid due to sleepiness caused by his diabetes. TR at 62, 107-08. Thus, Claimant is not capable of performing this position. Similarly, the position of Outsourcing Sales Representative is inappropriate because it requires prior sales experience and a GED, neither of which Claimant possesses. TR at 35, 67, 70-71, 115-116; EX 12I at 8. Several other jobs listed also require a GED: Residential Supervisor; Emergency Services Dispatcher; Security Monitor; ADT Sales Representative. *Id.* at 8-10.

Evidence of suitable alternative employment should be based on Claimant's actual capabilities. See *Turner,* 661 F.2d at 1042. Ms. Colenburg was aware Claimant did not have either a high school diploma or a GED certificate. EX 12I at 3. However she incorrectly noted in her initial assessment that Claimant was working toward his GED, and subsequently listed jobs in her labor market surveys requiring a GED. *Id.* at 3, 8-11. Claimant had dropped out of the GED program months prior to Ms. Colenburg's initial evaluation, after attending the GED course for approximately four months and finding the academic demands of the course far exceeded the level of his high school coursework. TR at 51-52; EX 10 at 5-6, 17. Thus, I find Ms. Colenburg's recommendation that Claimant apply to the jobs that require a high school

diploma or a GED indicates she did not conduct job searches based on Claimant's actual abilities.[5]

Although the positions of Appointment setter and Telemarketer do not require a GED and are sedentary positions that do not require lifting or driving, it is unclear whether Claimant possesses the level of interpersonal and customer service skills required. *See* EX 12I at 7-8. Claimant has never performed work of this nature. TR at 70. The Telemarketing position requires "good people skills" and the Appointment Setter position requires good customer service skills. EX 12I at 7-8. Although it is possible Claimant may have adequate skills in this area, he has no experience providing full-time customer service. TR at 70. Ms. Colenburg did not assess Claimant for customer service skills. In fact, Ms. Colenburg concluded in her initial report in July of 2002 that she need not meet Claimant at all, and apparently never did so. *See* EX 12I at 5; *see also generally* EX 12I at 1-20. Given Claimant worked for decades without any primary job duties requiring interaction with the public, and the only known customer service he provided involved assisting at two funerals for Claybar Funeral Home (TR at 60; EX 10 at 87-88, 90-91), the level of his customer service skills remains unknown.

Claimant testified that he has no experience in working continuously throughout the day with customers or clients. TR at 70. Although he apparently was able to interact productively with others in elected and appointed Union positions while working for Employer (*Id.* at 85-88), he did not experience the kind of frequent or intense contact with the public that he would encounter in a customer service position. Claimant testified that he has no experience with customer service, store keeping, building maintenance, telephone solicitation, appointment setting, retail or commission sales or other work with the public. *Id.* at 67, 70-72, 115-118. Claimant answered phones while working as a loan processor but did not necessarily garner any interactive experience beyond relaying phone calls and messages. *Id.* at 70, 97-98. It is unclear whether the phone calls were from customers or if instead they originated from other departments within the company. *See id*. at 97-98. As a loan processor, the extent of Claimant's interaction with customers appears to have been limited to gathering demographic information. *Id.* at 118-19. Thus, I conclude the evidence is inconclusive as to Claimant's ability to work in a position devoted to customer service, sales, or other jobs requiring considerable frequency and intensity of contact with the public. Accordingly, I find that the positions listed by Ms. Colenburg that require good customer service, sales and interactive skills do not constitute suitable alternative employment because Employer fails to establish that Claimant could perform, or even secure, these positions.

In sum, Ms. Colenburg failed to assess and tailor her survey to Claimant's physical limitations, including Dr. Johnston's lifting restrictions and Claimant's diabetes. Nor did she adequately tailor her survey to Claimant's education level, work experience and capabilities.[6]

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[5] Moreover, Ms Colenburg did not at any point gather updated information. Nearly two years after the initial assessment, Ms. Colenburg continued to recommend Claimant obtain his GED without accurately comprehending the considerable limitations Claimant encountered when he attempted to do so years prior. EX 12I at 15.

[6] The remaining labor market survey reports recommend Claimant obtain his GED and list positions generated by general computer searches for "light to medium duty" positions, rather than jobs that specifically conform to Claimant's physical limitations and vocational abilities. EX 12I at 12-20. I therefore accord Ms. Colenburg's opinion little weight and need not reach an inquiry concerning Employer's argument that Claimant could have pursued paid employment while receiving vocational rehabilitation services.

I conclude that no position listed by Ms. Colenburg during the relevant time period constitutes suitable alternative employment. As a result, Employer fails to establish suitable alternative employment for Claimant from May 21, 2002 to July 6, 2003. Accordingly, for the foregoing reasons I find Claimant was permanently and totally disabled during this period and that Claimant therefore is entitled to cost of living adjustments as of October 1, 2002. *See* 33 U.S.C. § 910(f); *see also Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (5th Cir. 1990) (en banc).

Wage-Earning Capacity

The Act provides that unscheduled permanent partial disability compensation shall be 66 2/3 per centum of the difference between a claimant's average weekly wages and his post-injury wage-earning capacity. *Devillier v. National Steel & Shipbuilding Co*., 10 BRBS 649, 660 (1979), citing 33 U.S.C. § 908(c)(21). The purely physical extent of disability is an important factor in determining unscheduled permanent partial disabilities under the Act, but the claimant's capacity to earn wages is the ultimate fact to be determined. *Id.* For such determinations, the Fifth Circuit has adopted the *Turner* inquiry which is also utilized for analyzing extent of disability. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1043 (5th Cir. 1992), citing *Turner,* 661 F.2d at 1042. Thus consideration of wage-earning capacity must address the claimant's specific capabilities, that is, age, background, employment history and experience, mental and physical capacities, education, and rehabilitative potential. *Turner*, 661 F.2d at 1037-38. The Act mandates a two-step analysis to determine post-injury wage-earning capacity. *Id*., citing 33 U.S.C. 908(h). The first inquiry requires determining whether actual post-injury wages reasonably and fairly represent the claimant's wage-earning capacity. *Randall v. Comfort Control, Inc*., 725 F.2d 791, 796-97 (D.C. Cir. 1984). If so, the inquiry ends there. *Id.* However, if actual wages are not representative of the claimant's wage-earning capacity then the inquiry focuses on what dollar amount fairly and reasonably represents that capacity. *Id.*

Claimant and Employer both contend that the rate of Claimant's wage-earning capacity should be changed. Apparently, the rate of compensation is presently calculated utilizing a wage-earning capacity of $240 per week. Claimant asserts that the weekly average of his earnings from July 7, 2003 through the end of 2005 should be instead utilized to calculate his wage-earning capacity, arriving at an average of $136.60 per week. Claimant's Post-hearing Brief at 17. Claimant alternatively asserts that, at maximum, his wage-earning capacity should remain at a rate of $240 per week based on the following employment: his position with Johnson's Wholesale Florists; his job working for Johnston's Sports Medicine Clinic; and potential employment "flipping burgers" at a fast-food restaurant. *See* Claimant's Post-hearing Brief at 3. For this alternative argument, Claimant does not appear to provide a basis for excluding his work at Claybar Funeral Home. *See id.* Neither party provided evidence of the availability of a job "flipping burgers" during this time period.

Employer argues that Claimant's wage-earning capacity should not be based on Claimant's actual wages, asserting Claimant voluntarily chose to be unemployed and underemployed during this period. Thus Employer asserts Claimant's wage-earning capacity ought to be based on the jobs listed in Employer's market surveys, and on the wage Claimant originally hoped to earn as a loan processor, $320-$400 per week. Employer's Post-hearing

Brief at 16 and Reply Brief at 4-5. Alternatively, Employer argues that, at a minimum, the rate should be the wage Claimant was paid by Claybar Funeral Home, $300 per week. *See id.*

Claimant's permanent partial disability began on July 7, 2003 and continues into the present. Claimant's employment for the period of July 7, 2003 to the time of the hearing is as follows. Claimant earned $240 per week in an OJT program sponsored by the DOL, as a loan processor with Countrywide through the end of September 2003. TR at 70, 98. When the OJT concluded, he received the same wage working as a loan processor with Countrywide's affiliate, FMM for one month (October 2003). *Id.* at 57; EX 10 at 73-74. Subsequently, after an approximately five-month period of unemployment, Claimant worked for Claybar Funeral Home starting on April 19, 2004, with full-time work as of June 2004 at a rate of $300 per week. TR at 58-60, 102, 105; EX 10 at 86-88.

At the hearing, Claimant admitted that from the time he left FMM at the end of October 2003 until he started working at Claybar Funeral Home in April 2004, he did not work but was capable of doing so, and could have at a minimum applied to fast food restaurants in his area. TR at 101-03, 112. Mr. Stanfill's notes indicate that in late 2003 and early 2004 Claimant's only efforts at work consisted of checking in with business contacts regarding the possibility of a loan processor position. EX 10 at 78, 82. During December 2003 and early January 2004, Claimant did not return Mr. Stanfill's phone calls. *Id.* at 76-79. They finally spoke in mid-January at which point Claimant told Mr. Stanfill that he had been checking in with his contacts in the mortgage business to no avail. *Id.* at 79. Subsequently, Mr. Stanfill had similar conversations with Claimant who did not engage in a general job search but continued to check in regularly with his mortgage industry contacts at least through March 2004. *Id.* at 82.

Claimant worked at Claybar Funeral Home from April to October of 2004. After quitting this job to obtain a job with benefits, he started work one week later at Johnson's Wholesale Florists for $240 per week plus benefits, from October 2004 to January 2005. TR at 60-61; CX 9 at 5; CX 10 at 2. He then left that position due to problems with sleepiness while driving which he later learned was caused by diabetes. TR at 62, 107; CX 9 at 5; CX 10 at 2-3. A few weeks later, he began running errands for Dr. Johnston's clinic, where he worked for three to four months in early 2005 for $240 per week plus free medical services. TR at 61, 63-64, 107-09. After Claimant's position was eliminated, he felt very "down and out" and admitted he could have applied for jobs during this second five-month period of unemployment (from mid-2005 to the end of 2005). *Id.* at 64-65, 110-12. Claimant took a temporary position in December 2005 for six weeks at Oak Acres Mobile Homes for $260 per week. *Id.* at 109-110. He then began developing a lawn care business in January 2006 which he testified has been in its early stages, grossing approximately $400-500 per month. *Id.* at 59, 65-67, 109-110; EX 10 at 70, 98.

Claimant argues that wage-earning capacity should be based on the weekly average of his earnings from July 7, 2003 through the end of 2005, including the two five-month periods of unemployment (from November 2003 to April 2004, and from early 2005 to the end of 2005). Claimant's Post-hearing Brief at 18. Although the rationale for this is unclear, it appears that Claimant is arguing that such periods will likely recur because Claimant has in the past experienced difficulties with motivation when he has felt disappointed about losing a job. However, at the hearing Claimant admitted he could have applied for jobs and was able to work

during these periods of unemployment. TR at 64-65, 101-03, 110-12. The evidence indicates that Claimant experiences difficulty taking action on prospective employment after encountering a disappointment (*Id.* at 57-58; EX 10 at 46, 76-79, 80, 82), yet he has repeatedly been able to summon his motivation to continue a job search when going through extreme emotional difficulty, such as when he went through a separation and divorce, which he testified impacted his motivation during the first five-month period of unemployment. TR at 101-03. Similarly, when Claimant was unable to secure an OJT position with McAfee, the mortgage company where he had volunteered for six months, he struggled with some disappointment but rallied his motivation and eventually located an alternative OJT employer. *Id.* at 58, EX 10 at 39, 41. In addition, during four of the first five months in which Claimant was unemployed (November 2003 to April 2004), Claimant made phone calls to his mortgage industry contacts. TR at 82; EX 10 at 82. Thus, it appears Claimant could have engaged in a broader job search by making phone calls to other potential employers. Similarly, Claimant apparently could have contacted a variety of potential employers during the second five-month period of unemployment, from mid-2005 to January 2006. Claimant admitted as much at the hearing. TR at 64-65, 101-03, 110-12. Thus I conclude that although motivation is a factor in Claimant's employment and employability, it would be inappropriate to include these two roughly five-month periods in calculating his post-earning wage capacity, because the evidence indicates Claimant was capable of engaging in a job search.

Claimant also argues that his employment has been unstable, due to his working positions for brief periods of time, and that this should be expected to continue in the future. However, the reasons Claimant's employment terminated were for the most part due to situations unrelated to his vocational capabilities. He left jobs sometimes for voluntary reasons such as to seek health care benefits. *Id.* at 60-61, 107. At other times, Claimant was forced to leave a job for reasons having nothing to do with him; for example, his position was eliminated at FMM (*Id.* at 57; EX 10 at 70, 73-74) and also with Dr. Johnston's clinic (TR at 63) due to an industry slowdown and business restructuring, respectively. Claimant needed to leave his position with Johnston's Wholesale Florists because he cannot work a job that requires extensive driving (*Id.* 62, 107-08; CX 9 at 5), but this does not significantly limit Claimant because most positions for which he is qualified do not require extensive driving. It appears the only position Claimant actually was forced to quit based on his own limitations was this position with Johnston's Wholesale Florists. TR at 107-08.

For the foregoing reasons, I find the evidence does not indicate Claimant is somehow limited in his capacity to sustain long-term employment. Rather, I conclude Claimant has had to face very hard facts and significant disappointments over the course of his post-injury employment. Presumably he has had to adjust to a significant loss in earning power. Also, as Claimant stated at the hearing, he has learned that he cannot expect all employment to be as stable as was his position with Employer. *Id.* at 65. In addition, the fact that Claimant has developed a current business plan and is executing it (*Id.* at 65-66) indicates he is willing to risk further vocational disappointment. *Id.* at 64-65.

Whether Claimant finds success in the lawn care business as he anticipates (*Id.* at 67) or whether instead he finds himself once again in need of employment, I find that his resilience despite the disappointments he has experienced indicates he is quite capable of sustaining

permanent full-time employment. Certainly he was capable of doing so prior to his injury, as demonstrated by his work for Employer for a period of 25 years. *Id.* at 36.

Employer argues that Claimant's wage-earning capacity should not be based on actual wages earned during the time period of July 7, 2003 through the end of 2005. Employer contends that the positions Claimant has held are unrepresentative of his earning capacity because he could have obtained and held positions that paid significantly more. Employer asserts that Claimant could choose to work as a full-time loan processor earning $320-$400 per week. However, Employer fails to demonstrate that Claimant would earn this wage instead of the $240 per week that he actually earned. Employer merely cites Claimant's testimony indicating that at one point he had hoped for such a salary as a loan processor. *Id.* at 70, 98.

Employer also emphasizes that Claimant quit a higher-paying position at Claybar so that he could obtain a lower-paying job with health care benefits at Johnson's Florists from October 2004 to January 2005. Claimant earned $240 per week plus benefits and then worked for Dr. Johnston for three to four months in early 2005 for this same salary plus free medical services. Employer argues these latter two positions that provided health care but paid less should not be considered as representative of Claimant's earning capacity because it was Claimant's choice to leave Claybar to work in these lower paying positions. However, I find Claimant's motivation in moving from the higher paying job to the lower paying job is reasonable. *See Beck v. Newport News Shipbuilding and Dry Dock Co*., 33 BRBS 542(ALJ) (August 16, 1999), citing *Louisiana Insur. Guar. Ass'n v. Abbott*, 40 F.3d 122, 128-29 (5th Cir. 1994). Apparently, Claimant was either able to secure a job earning $300 per week without benefits (at Claybar) or $240 per week (at the florist and for Dr. Johnston's clinic) with health care benefits or services.

However, I do not find that the position with Claybar Funeral Home or the position with Dr. Johnston's clinic should be considered representative of Claimant's earning capacity on the job market at the time because it is unclear whether Claimant would have secured either position without the beneficence of others. Dr. Johnston as Claimant's treating physician knew of Claimant's injury and the fact he needed to secure employment (12E at 2, 3, 68) so beneficence on Dr. Johnston's part may have contributed to Claimant securing the position with him. *See Lopes v. Georgia Ave. Tavern*, 13 BRBS 1125, 1128 (1981). Similarly, beneficence may have been involved where a friend of Claimant's told him he thought he could get him the job at Claybar. TR at 103. Also, Claimant's sister, who was a florist for Claybar at the time, offered to help him secure a job interview. EX 10 at 84, 86. I therefore conclude neither position can be considered representative of Claimant's capacity to perform and secure employment on the open labor market at that time. *See id.* In addition, because Claimant apparently is not capable of doing a significant amount of driving, the position with Johnson's Wholesale Florists cannot be considered reasonably and fairly representative of Claimant's earning capabilities.

After a significant period of unemployment (of roughly five months from mid-2005 to the end of 2005), Claimant took a temporary position for six weeks (12/2005 to 1/2006) at Oak Acres Mobile Homes for $260 per week. TR at 109-110. However, this position entailed temporary assistance with post-hurricane clean-up. It was not offered to Claimant as an ongoing position and therefore is not reasonably and fairly representative of Claimant's capacity to obtain a permanent position.

In January of 2006, Claimant took over his parent's new lawn care business and began developing it so that he could eventually become self-supporting through this business. *Id.* at 59. He testified the business has been grossing approximately $400-500 per month. *Id*. at 59, 65-67, 109-110; EX 10 at 70, 98. Because the Board has rejected the use of gross earnings in determining earning capacity because gross income is not an accurate indication of actual earnings, I find the gross earnings from Claimant's lawn care business cannot be utilized to calculate his wage-earning capacity. *See Rountree v. Newpark Shipbuilding & Repair*, 13 BRBS 862 at 867 n.6 (1981) *rev'd on other grounds* 698 F.2d 743 (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399 (5th Cir. 1984).

Employer argues that the jobs listed in Ms. Colenburg's labor market surveys should be considered in calculating Claimant's wage-earning capacity, asserting that these surveys should be considered representative of Claimant's earning abilities. However, even if I were to accord weight to the labor market surveys, which I found to be entirely lacking, I would not reach consideration of these surveys because I find some of Claimant's actual employment was reflective of his earning capacity. I find that the rate of $240 per week reasonably and fairly represents Claimant's wage-earning capacity. Claimant earned $240 per week as a loan processor at FMM in October 2003 before he was laid off due to economic factors. TR at 70, 98; EX 10 at 73-74. It is apparent that but for recessionary problems in the loan industry Claimant would have continued to work as a loan processor and presumably he could still secure such work presently.

Adjustment for inflation

When post-injury wages are used to establish wage-earning capacity, the wages earned in the post-injury job must be adjusted to represent the wages which that job paid at the time of the claimant's injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). This conversion ensures that the calculation of the lost wage-earning capacity is not distorted by a general inflation or depression. *Kleiner v. Todd Shipyards Corp*., 16 BRBS 297, 298 (1984). The post-injury wages should be adjusted using the percent change in the National Average Weekly Wage ("NAWW"). *Quan v. Marine Power & Equipment Company*, 30 BRBS 124 (1996); *see also* 33 U.S.C. §906(b)(1)-(3). Accordingly, I find that for purposes of calculating wage-earning capacity Claimant's wages of $240 per week as a loan processor at FMM in October 2003 should be adjusted by reference to the NAWW.

Interest

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Wilkerson v. Ingalls Shipbuilding, Inc.,* 125 F.3d 904, 906 (5th Cir. 1997). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Accordingly, interest on the unpaid compensation amounts due and owed by Employer, including cost of living compensation, should be included in the District Director's calculations of amounts due under this decision and order.

Attorney's Fees and Costs

Thirty (30) days is hereby allowed to Claimant's counsel for the submission of an application for attorney's fees and costs. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the parties, including Claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED:**

1. Because Claimant was permanently and totally disabled from May 22, 2002 to July 6, 2003, Employer shall pay Claimant increased compensation based on cost of living adjustments for this period.

2. Employer shall pay Claimant compensation for partial permanent disability from July 7, 2003 and continuing, as calculated by the District Director utilizing the stipulated average weekly wage of $826.04 and Claimant's wage-earning capacity which shall be based on his wages of $240.00 per week in October 2003 as adjusted for inflation.

3. Employer is entitled to credit for all payments previously made.

4. Employer shall pay interest on all unpaid compensation benefits from the date the compensation became due until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. § 1961.

5. All monies owed shall be administratively calculated by the District Director.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge